

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review	)	CC Docket No. 94-1
for Local Exchange Carriers	)	
	)	
Amendment of the Commission's Rules:	)	
Regulatory Access Charge Reform and	)	RM 9210
Price Cap Performance Review for	)	
Local Exchange Carriers	)	

**Reply Comments of  
Excel Telecommunications, Inc.  
In Support of Prescriptive Action to  
Establish Cost-Based Access Charges**

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### **Summary**

As Excel and many other parties showed in their initial comments, while new entrants are making slow progress under the pro-competitive framework of the 1996 Act, competitive entry to date falls far short of the actual competition that is needed to place downward pressure on ILEC interstate access rates. Many commenters also agreed with Excel that the information necessary to prescribe cost-based rates is readily available (in the form of state commission set cost-based prices for UNEs and transport and termination) or could be developed easily (*e.g.* the recently adopted cost model for universal service). ILECs, in contrast, ask the Commission to rely on paper promises and the theoretical potential of competition and find that the market-based approach is not only working, but should be significantly expanded to essentially deregulate price cap LECs' interstate access services immediately. Some ILECs readily admit that their proposed Phase I triggers (or, in the case of U S WEST, the Phase III triggers) are, conveniently, already met. The failure of the market-based approach is further evidenced by the ILECs' own actions; price cap LECs continue to price their interstate access services at the maximum allowed by their price cap indices in virtually every basket. Consistent with precedent, the Commission should take deregulatory action to grant ILECs pricing flexibility only when ILECs produce evidence of actual competition, not mere paper promises.

In initial comments, Excel argued that if the Commission does not prescribe cost-based rates, it must increase the X-Factor. In initial comments, MCI WorldCom, AT&T, and Ad Hoc all presented evidence that the Commission substantially underestimated ILEC productivity by relying

on total company data rather than interstate-only data. Even ILECs have admitted, albeit before state commissions, that interstate productivity far exceeds ILEC local, intrastate productivity. ILECs cannot have it both ways. The Commission should act now to reconsider its May 1997 X-Factor decision and raise the X-Factor to accurately reflect price cap LEC interstate productivity levels.

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Excel Telecommunications, Inc.  
In Support of Prescriptive Action to  
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Excel Telecommunications, Inc. ("Excel"), on behalf of its operating subsidiaries, by undersigned counsel and pursuant to the Federal Communications Commission's ("Commission") Public Notice released October 5, 1998,<sup>1/</sup> hereby submits its Reply Comments in the above-captioned proceedings.

**I. Introduction and Summary**

In its initial comments, Excel argued that the Commission must defer the market-based approach to access charge reform because the preconditions to make that approach work have not materialized. Specifically, competition in local markets has not developed sufficiently to place any downward pressure on price cap local exchange carriers' ("LECs") interstate access rates. Excel

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<sup>1/</sup> *Commission asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment on Proposals for Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256 ("Public Notice") (rel. Oct. 5, 1998).

urged the Commission to adopt a prescriptive approach to access reform and prescribe price cap LECs' interstate access rates to forward-looking cost. In the alternative, Excel urged the Commission to increase the X-Factor as a means to reduce inflated access charges based on substantial record evidence that the Commission had improperly set the 6.5% X-Factor too low.

In these reply comments, Excel briefly reviews the strong record support for Excel's recommendation to adopt a prescriptive approach. Excel also rebuts the outlandish arguments made by price cap LECs in favor of the market-based approach and pricing flexibility. These parties claim not only that the market-based approach is working, but also that sufficient competition exists to justify immediate deregulation of their interstate switched access and transport rates. As Excel and many other parties showed in their initial comments, while new entrants are making progress under the pro-competitive framework of the Telecommunications Act of 1996 ("1996 Act"), the level of competitive entry falls far short of the actual competition that is needed to place downward pressure on incumbent LEC ("ILEC") interstate access rates. Consistent with precedent, the Commission should take deregulatory action to grant ILECs pricing flexibility only when ILECs produce evidence of actual competition, not mere paper promises.

**II. The Preconditions Necessary for the Market-Based Approach to Succeed Have Not Materialized and Will Not Materialize in the Near Future**

As Excel and many other parties showed in initial comments, the preconditions necessary for the market-based approach to succeed have not materialized and will not materialize in the near

future.<sup>2/</sup> Although the 1996 Act created a framework for local competition, and some new entrants are beginning to provide competitive local services to customers, implementation has been slow and difficult and the results have failed to meet many parties' expectations. Excel and others presented evidence that:

- ILECs received 97.5% of total local service providers local revenues in 1997.<sup>3/</sup>
- By year end 1998, CLECs will serve only about 1.4 million, or 0.8% of the nation's estimated 177 million access lines, through UNE-based entry.<sup>4/</sup>
- Commission survey data shows that less than 0.1% of local service lines are being provided by CLECs using unbundled loops and only 4% of ILEC wire centers have a physical collocation arrangement with at least one CLEC using unbundled loops.<sup>5/</sup>
- CLECs accounted for only 5.1% of the business market for local telecommunications services in 1997.<sup>6/</sup>
- Even under the most "rosy scenario," new entrants have less than 10% of the total interstate access market.<sup>7/</sup>

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<sup>2/</sup> See, e.g., Ad Hoc at 3-10.

<sup>3/</sup> GSA at 9 (*citing* Industry Analysis Division, *Telecommunications Industry Revenues: 1997*, (Oct. 1998), at Table 4); Sprint at 10 (*citing Id.*).

<sup>4/</sup> CPI at 8 (*citing* Merrill Lynch, *United States Telecommunications/Services; Telecom Services -- Local*, 21, 28 (Sept. 22, 1998)).

<sup>5/</sup> Ad Hoc at 4, App. 1 (summarizing FCC Local competition Survey Data by ILEC).

<sup>6/</sup> CoreComm at 4, n.6 (*citing* The Strategis Group, *U.S. Competitive Local Markets*, 98 (1998)).

<sup>7/</sup> ALTS at 6 & n.10 (*citing* Strategis Group) (assuming all 1997 CLEC access revenues were interstate, CLECs still earned less than 10 percent of approximately \$20 billion ILECs earn in interstate access charges).

Even more significant than market share, however, is the simple fact that price cap LECs continue to price their interstate access services at the maximum allowed by their price cap indices in virtually every basket. AT&T notes that price cap LECs' filed rates are a paltry \$94 million below the aggregate \$23 billion cap.<sup>8/</sup> TRA notes that only Ameritech and Nevada Bell price below cap for the transport basket and all BOCs price at cap for the traffic-sensitive and common line baskets.<sup>9/</sup> Based on available evidence, it is clear that the flexibility ILECs are seeking is the flexibility to undercut new entrants and increase prices where competition has not developed.

As an IXC whose customer base is primarily residential, Excel shares the concerns of the WUTC that ILECs will use pricing flexibility to raise rates for rural and residential customers.<sup>10/</sup> If access rates were cost-based averaged rates, ILECs might be justified in increasing rates in one area when decreasing them in another. However, access rates are not cost-based. Therefore, Excel agrees with the WUTC and the CPI that if, contrary to Excel's and other parties' strong opposition, the Commission grants ILECs any pricing flexibility, such flexibility should be downward only.<sup>11/</sup> ILECs should only be able to increase access prices upon a showing that the cost-based rate for a particular service is above the price currently charged.<sup>12/</sup>

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<sup>8/</sup> AT&T at 5 & n7.

<sup>9/</sup> TRA at 7-8. *See also* MCI WorldCom at 37 (all RBOCs except Nevada Bell continue to price common line and traffic sensitive access services as high as permissible).

<sup>10/</sup> WUTC at 13.

<sup>11/</sup> *Id.*; CPI at 10.

<sup>12/</sup> *See*, WUTC at 13.



Based on this and other evidence of a lack of market pressure on ILEC access rates, the majority of parties submitting comments to refresh the record advocated a prescriptive approach to reducing access rates.<sup>13/</sup> Many commenters also agreed with Excel that the information necessary to prescribe cost-based rates is readily available<sup>14/</sup> (in the form of state commission set cost-based prices for UNEs and transport and termination) or could be developed easily<sup>15/</sup> (e.g. the recently adopted cost model for universal service).

ILECs, in contrast, ask the Commission to rely on paper promises and the theoretical potential of competition and find that the market-based approach is not only working, but should be significantly expanded to essentially deregulate price cap LECs' interstate access services immediately. Ameritech, Bell Atlantic, and USTA all propose that the Commission grant price cap LECs significant pricing flexibility based on the so-called "competitive" triggers of one state-approved interconnection agreement or SGAT plus either the "availability of" or "a customer's use of" alternative access suppliers. These sham conditions would already be satisfied today in virtually

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<sup>13/</sup> ACTA at 6; Ad Hoc at 11; API at 3; AT&T at 2; CFA, ICA, NRF at 2; C&W at 3 (endorsing CompTel); CompTel at 13 (phase-in cost-based rates over 2-year period); Consumers Union at 2; Sprint at 6; MCI WorldCom at 24-25; Excel at 10; GSA at 12; TRA at 5; Western Wireless at 15; WUTC at 5, 9 (for terminating rates).

<sup>14/</sup> See, e.g., CompTel at 14 (use UNE rates); WUTC at 5, 7 (use reciprocal compensation rates).

<sup>15/</sup> See, e.g., AT&T at 7-8; Sprint at 8.

all markets -- indeed, some ILECs readily admit that their proposed Phase I triggers (or, in the case of U S WEST, the Phase III triggers) are, conveniently, already met.<sup>16/</sup>

Another serious fault of the proposals is their astonishing silence regarding how the Commission would implement the tests. Because all three pricing proposals are primarily submitted in presentation format (tables and/or slides), all three lack the detail necessary to perform a thorough analysis. While Excel had hoped that the proponents would provide more detail in their initial comments (*e.g.*, means by which the Commission should measure the existence of "customers [that] are utilizing alternative transport [or switched access] services"<sup>17/</sup>), the initial comments still fail to provide such details. For example, none of the ILECs provides a definition or means to determine whether "25 percent of an incumbent LEC's transport demand is *addressable* through collocation arrangements or alternative networks, and customers are *utilizing* alternative transport services."<sup>18/</sup> As GSA notes, the "'ability' of competitors to offer services is a very nebulous concept that may be far removed from any semblance of a clear position in the market."<sup>19/</sup>

Another blatant omission from the proposals is detail regarding the relationship between the triggers and the geographic scope of the pricing flexibility that follows satisfaction of the triggers.

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<sup>16/</sup> U S WEST at 16-18 (Phoenix example, competition already full-blown in many markets); GTE at 22 (no need to wait for greater competition to establish pricing flexibility); SBC at 10 (vast majority of SBC access customers purchase access from an alternative supplier).

<sup>17/</sup> USTA at 36.

<sup>18/</sup> USTA at 37 (emphasis added).

<sup>19/</sup> GSA at 8.

The USTA proposal, in a table, lists geographic components of MSA, contiguous MSAs, or a LATA. Yet the proposal never specifies that the trigger would have to be met for a particular MSA before pricing flexibility would be granted for that MSA. Furthermore, given that some states comprise only one LATA, contemplating LATA-wide (*i.e.* state-wide) pricing flexibility on the existence of one state-approved interconnection agreement and one customer purchasing alternative transport or switched access services is patently absurd.

**III. Actual Competition, Not Theoretical Potential Competition, Is the Only Deregulatory Trigger Consistent with Commission Precedent**

As many parties aptly stated in one form or another, "pricing flexibility should be based on market facts not market potential."<sup>20/</sup> In evaluating whether or not to relax regulation of a dominant carrier's rates, and/or declare a carrier non-dominant, the Commission has traditionally analyzed supply and demand elasticities, market share data, and measures of the firm's relative cost structure.<sup>21/</sup> In 1991, when the Commission decided that increased long distance competition justified streamlined regulation of AT&T, it gave significant consideration to the fact that AT&T consistently set prices for certain services below the relevant price cap.<sup>22/</sup> As shown above, the BOCs are clearly not meeting this test.

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<sup>20/</sup> ALTS at 7. *See also* Ad Hoc at 28; CPI at 10; Core Comm at 6; CTSI at 5; KMC at 3, 6; MediaOne at 5; RCN at 4.

<sup>21/</sup> Time Warner at 15; SBC at 3.

<sup>22/</sup> *Competition in the Interstate Interexchange Marketplace*, Report and Order, 6 FCC Rcd 5880, ¶49 (1991).

Furthermore, under the market share test, the Commission did not grant AT&T pricing flexibility until it lost approximately 40% of the market and a number of firms had a 5-10% market share.<sup>23/</sup> Evidence that ILECs have lost some trivial share of the market for switched access services clearly does not meet this threshold. Implicitly acknowledging that competitors have to date won minimal market share away from ILECs, some ILECs urge the Commission to abandon its traditional reliance on market share in evaluating whether a dominant firm deserves pricing flexibility.<sup>24/</sup> Some ILECs also ask the Commission to consider, in this case, the self-provisioning potential of newly merged entities MCI WorldCom and AT&T/TCG.<sup>25/</sup> Excel will permit MCI WorldCom and AT&T to respond to ILEC claims that their so-called self-provisioning potential should be a factor in the Commission's analysis. However, as the fourth largest long distance carrier in the U.S., Excel wishes to make clear that whatever self-provisioning potential the number one and number two long distance carriers may enjoy, it will not benefit Excel or any other long distance carrier that purchases access services directly from ILECs or resells the long distance services of long distance carriers other than MCI WorldCom / AT&T.

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<sup>23/</sup> ALTS at 8 (*citing Motion of AT&T Corp. to be Reclassified as a NonDominant Carrier*, 11 FCC Rcd 3271 (1995)).

<sup>24/</sup> See, e.g., Bell Atlantic, Crandall Decl. at 18.

<sup>25/</sup> See, e.g., Ameritech at 4; Bell Atlantic at 9; SBC at 3, 8.

**IV. The Commission Should Grant AT&T's and Ad Hoc's Petitions for Reconsideration and Raise the X-Factor**

In initial comments, Excel argued that if the Commission does not prescribe cost-based rates, it must increase the X-Factor. MCI WorldCom, AT&T, and Ad Hoc all presented evidence that the Commission substantially underestimated ILEC productivity by relying on total company data rather than interstate-only data. Even Commission staff data shows that ILECs' average interstate growth rate for the period 1986 to 1995 was nearly double the average growth rate for the ILECs total company services.<sup>26/</sup> As AT&T shows, ILECs have admitted, albeit before state commissions but not this Commission, that interstate productivity far exceeds ILEC local, intrastate productivity.<sup>27/</sup> ILECs cannot have it both ways; the Commission must not permit ILECs to play federal and state regulators in this manner.

MCI WorldCom recommends an X-Factor based on updated interstate productivity evidence of at least 9.2%<sup>28/</sup>; Ad Hoc 9%;<sup>29/</sup> AT&T at least 9.2% to 10%.<sup>30/</sup> These and other parties correctly note that ILECs have enjoyed substantial interstate rates of return notwithstanding the 6.5% X-

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<sup>26/</sup> AT&T at 17.

<sup>27/</sup> AT&T at 19 and Attachment B.

<sup>28/</sup> MCI WorldCom at 28-29.

<sup>29/</sup> Ad Hoc at 24.

<sup>30/</sup> AT&T at 22.

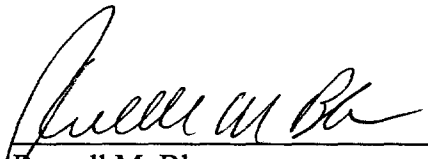
Factor.<sup>31/</sup> Contrary to ILEC claims, excessive interstate rates of return do provide evidence that the X-Factor is too low. As GSA argues, because almost all ILEC interstate revenues are derived from access charges, the excessive ILEC earnings indicate that access charges are too high.<sup>32/</sup> The Commission should act now to reconsider its May 1997 X-Factor decision and raise the X-Factor to accurately reflect price cap LEC interstate productivity levels.

**Conclusion**

For the foregoing reasons, Excel urges the Commission to take prompt, prescriptive action to establish access charges at forward-looking, cost-based levels.

Respectfully submitted,

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<sup>31/</sup> See, e.g., AT&T at 22-24 (price cap LECs had on average an interstate rate of return of 15.64% in 1997); GSA at 4-5; MCI WorldCom at 32-34.

<sup>32/</sup> GSA at 6-7.

### Certificate of Service

I, Suzanne Turner McBride, certify that I have this 9th day of November, 1998, served copies of the Reply Comments of Excel Telecommunications, Inc. via hand delivery\*, or First Class U.S. Mail, on the parties listed below.

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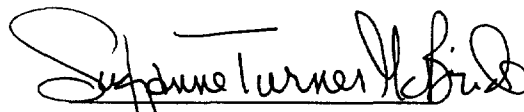
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